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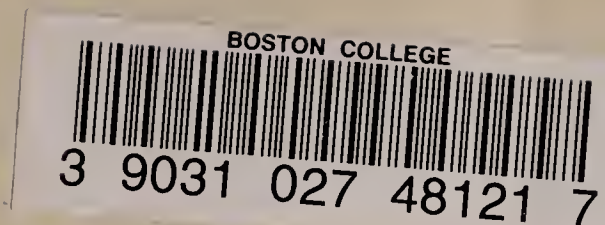
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Indian wardship

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INDIAN WARDSHIP.

BY CHARLES E. PANCOAST.

The relationship between the Indian tribes and the United States has come to be defined by the term "Wardship."

In 1831 Chief Justice Marshall, after declining to describe the Indian tribes as foreign nations, said "they may more correctly perhaps be denominated domestic dependent nations.

. . . . They are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian." (Cherokee Nations *v.* Georgia, 5 Pet. 1.) But in 1871 the United States ceased to make treaties with them, as with nations, and thereafter substituted the word *contract*. (Rev. Stat. 2072, act March 3, 1871.) And finally in 1885 Mr. Justice Miller declares: "These Indian tribes *are* the wards of the nation.

. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and treaties in which it has been promised, there arises the duty of protecting, and with it the power." (U. S. *v.* Kagama, 118 U. S. 375.)

Notwithstanding the Land in Severalty Act, approved July 8, 1887, under which Indians may take up allotments and become citizens of the United States, and the Secretary of the Interior may allot to those failing to apply, many Indians, probably the majority, still continue their tribal relations, with community of property, and are still under this "wardship" benefitting by the faithfulness or suffering from the unfaithfulness of their guardian; and this condition seems likely to con-

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tinue. It is interesting, therefore, to examine the nature of this wardship a little more closely.

The Supreme Court has well said that the relationship of the Indian tribes to the United States has always been an "anomalous one, and of a complex character" (U. S. v. Kagama); and while saying that it "*resembles*" a guardianship, and later that it *is* a guardianship, it is easy to see that in point of fact this National guardianship differs materially from that between individuals. About the latter relation the law places certain safeguards designed to protect the ward and to remove temptation to breach of trust. Thus a guardian cannot buy his ward's property; he cannot contract with his ward, and even when the ward has come of age, contracts with the guardian made immediately thereafter are looked on with suspicion. A person whose interests were or might become adverse to those of the ward would not be appointed guardian by the courts; and those whom they appoint must enter security, and are held accountable for negligence, as well as for active breaches of trust. It results that breaches of trust are comparatively rare, and that the remedy is prompt and usually effective.

In the national guardianship, however, these safeguards are wanting. Under politics as now conducted, with the constant demand of office seekers and of land grabbers, the interests of the nation or, at least, of its government, may fairly be described as adverse to those of the Indians. Yet the nation is their guardian. This guardian contracts with its wards for the sale of their land and property, and is both buyer and seller. With others, the wards cannot make contracts without the guardian's approval; but with their guardian they can contract freely. And for any breach of trust, the remedy is indeed a slow and doubtful one. It consists practically of an appeal to the conscience of Congress. The Indian's guardian can be sued only by its own permission, in its own courts, and its approval and sanction are necessary to a contract between its wards and their attorneys, retained by them to conduct their suits. It is fair to say that this requirement of approval is intended to protect the Indians against improvident contracts. But the requirements may sometimes prove to obstruct justice.

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Thus in the Indian wardship we find not only an absence of the usual and necessary safeguards, but also an ineffective remedy for negligence or other breaches of trust. Hence the constant occurrence of such breaches, the appeals to the friends of the Indian to assume their guardian's neglected duties, to prevent unjust legislation or contract, and often, as in the case of Little Whirlwind and of the Warner Ranch Indians, to furnish money and counsel for the protection of Indians threatened with the loss of property, of liberty, or of life.

The latter case, decided by the Supreme Court of the United States, May 31, 1901, well illustrates the nature of Indian guardianship. The question involved was the title to certain lands. One of the points was that the Indians, if they had rights, had failed to assert them in time; and it was answered that if so, the government was itself in default by its failure to act for them. The Court said:

"It is undoubtedly true that this government has always recognized the fact that the Indians are its wards and entitled to be protected as such, and this Court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this Court has never assumed, in the absence of congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (Sec. 16) 'to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.' *It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligations to the Indians, did all that it deemed necessary, and as no action has been shown in reference to the particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action.*"

It is true that the Court further said that they were not *compelled* to rest upon this presumption and that there was evidence

which justified a finding of facts on points adverse to the Indians. But the principle above stated is none the less true. A commission was created to ascertain and report on the rights of the Indians, and in the absence of any evidence it is legally assumed that the commission performed that duty, and that Congress "in discharge of its duty to the Indians did all that it deemed necessary." In the carefully guarded language of the Court, "as no action has been shown in reference to these particular Indians or their claims to this land, it is fairly to be deduced that they had no claims which called for special attention."

Whatever the facts, this presumption would have been sufficient. As against a stranger, the Indians are bound by their guardian's failure to act. As against their guardian, they have perhaps a moral claim for consideration, based on neglect to investigate their rights in time, and, if in fact they had none, at least to make for them some other provision and not permit them to occupy and improve land to which they had no title.

The probability is that the anomalies above referred to are inseparable from Indian wardship. It is not easy to see who could be guardian if not the nation ; and perhaps under all the conditions, it is cause for congratulation that matters have not been worse. But we may understand the need for a strong association upheld by a strong public sentiment, to act where necessary, as the next friend of the Indians, while national guardianship continues ; and we may also perhaps consider whether the time is not rapidly approaching to remove all guardianship, to do away with a nursing system, which tends to foster and perpetuate weakness rather than to develop strength. Many would, no doubt, go down were the support removed, but in the end the total of suffering might be less.

